Supreme Court, U.S.
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No. 10-_____

In the
Supreme Court of the United States

In the Matter of Mark Cimini v. Marilyn Ray Smith, Mass. Department of Revenue, Fidelity Investments, Margaret Cimini

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE
MASSACHUSETTS
APPEALS COURT FOR THE COMMONWEALTH

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented:

1. When the first colonists set foot on this continent a trial by jury under Common Law jurisdiction was the only legal method of what is now termed 'child support'. Since the colonist were forbidden from enacting laws repugnant to the laws of England and there is no charter, colonial law, or evidence of this Common Law right to a trial by jury over providing necessities for a child being overturned, the questions for this court are:

    a. Has the state unconstitutionally eliminated a right to a trial by jury?

    b. Has the state violated Due Process in eliminating the ability to question that the money be spent on necessities?

    c. Has the state violated Due Process by eliminating the requirement of showing harm be shown before imposing the punishment of child support?

2. Two standing precedents from this court state that custody can only be adjudicated under Common Law jurisdiction, that it is a violation of Due Process to adjudicate in any other jurisdiction. Massachusetts case law also shows that custody and divorce was determined under Common Law jurisdiction. Thus the questions for this court are:

    a. Does the difference between custody hearings under Common Law jurisdiction versus "Best Interest" determinations

under Equity jurisdiction violate multiple Constitutional provisions to include the Due Process, and the Eighth, Ninth and Thirteenth Amendments?

3. Given divorce was solely a criminal and Common Law matter from 1630 till 1838, does the state violate the Sixth Amendment when it adjudicates divorce under equity without the right to a trial?

4. The state searches for and takes 'Child Support' money without a hearing. Lacking a hearing to determine if the amount if valid, does the state violate both the Fourth and Fifth Amendment

5. Do all parties with knowledge of an illegal act, i.e., search and seizure, and who act in concert to deprive a person of Constitutional rights constitute a conspiracy?

Parties to the Proceedings:

Mark Cimini, Petitioner, and Marilyn Ray Smith, The Massachusetts Department of Revenue, Fidelity Investment, and Margaret Cimini, Respondents. Respondents Marilyn Ray Smith and the DOR are represented by the Massachusetts Attorney General's Office. Respondent Fidelity is represented by Demeo & Associates. Respondent Margaret Cimini is represented by Gerald Venezia.

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Petition for the Writ of Certiorari:

Petitioner Mark Cimini respectfully petitions for a Writ of Certiorari to review the judgment of the state courts which contradicts federal laws and deprives tens of millions of fit and able parents of their children, their personal liberties, their property, and constitutional rights because the state imposes its beliefs on people, often completely disregarding criminal actions of the parties involved.

The state also does not provide the most basic constitutional protections once a parent has been labeled "non-custodial." The state searches for and takes money for fictitious amounts of child support without providing any hearing.

As a result the state courts have deprived the petitioner of at least personal liberty, Happiness, and the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Thirteenth, and Fourteenth Amendment.

Opinions Below:

The state began searching for and taking property from the plaintiff without a hearing. The Plaintiff wrote to the Department of Revenue demanding a hearing, specifically a trial by jury over the disputed amounts. There has never been a court hearing regarding the regarding any alleged arrears.

The Plaintiff filed in 2007 in Massachusetts Superior Court regarding loss of rights and conspiracy for loss of rights. The Superior Court dismissed the matter (Appendix B and C), stating no right to a hearing since the Plaintiff had requested a trial by jury and used the court void case law to ignore the claim of conspiracy. A timely appeal was filed.

The Appeals Court (Appendix D) also failed to acknowledge the right to any hearing, did not address the statutory changes to the law, used challenged dicta, and did not correct the misuse of void case law. A timely appeal to the Massachusetts Supreme Judicial Court was filed as a request for further appellate review (FAR).

The FAR dismissal was rendered 11 September 2009 (Appendix A) leaving the Federal Constitutional issues unaddressed in the Massachusetts Courts.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution

First Amendment, Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourth Amendment, pertinent part, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and ..."

Fifth Amendment, pertinent part, "No person shall ... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment, pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ..."

Seventh Amendment, pertinent part, In Suits at common law, ... the right of trial by jury shall be preserved, ...

Eighth Amendment, pertinent part, "... nor cruel and unusual punishments inflicted."

Ninth Amendment, reads, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Tenth Amendment, reads, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Thirteenth Amendment, Section 1, reads "Neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

Fourteenth Amendment, Section 1, pertinent part, "... nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of the Commonwealth of Massachusetts:

Declaration of Rights, Article XV, reads, "In all controversies concerning property, and in all suits between two or more persons, except in cases in which it has heretofore been otherways used and practiced, the parties have a right to a trial by jury; and this method of procedure shall be held sacred, unless, in causes arising on the high seas, and such

as relate to mariners' wages, the legislature shall hereafter find it necessary to alter it."

Declaration of Rights, Article XXIX, pertinent part, "It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

Statutes Involved:
Federal Statutes

28 U.S.C. §1257(a). Jurisdiction and venue: State courts; certiorari. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

Massachusetts Statutes

Statutes 1692-3, Chapter 18: An Act For the Punishment of Criminal Offenders
Fornication [Sect. 5] [pertinent part]
That if any man commit fornication with any single woman, upon due conviction thereof they shall be fined unto their majesties not exceeding the sum of

five pounds, and be corporally punished by whipping, not exceeding ten stripes apiece, at the discretion of the sessions of the peace who shall have cognizance of the offence.

Statutes 1785, Chapter 69, Provided always, That no decree of divorce for or on the account of adultery shall bar the issue of such marriage from inheriting, but the decision of the right of such child or children to inherit shall be tried and settled upon the principles of common law, in the same manner as though this act had never been made.

Statutes 1835, Chapter 76, Section 20, "A divorce for the cause of adultery, committed by the wife, shall not affect the legitimacy of the issue of the marriage, but the legitimacy of the children, if questioned, shall be tried and determined according to the course of common law."

Statutes 1838, CHAP. CXXVI, An Act relating to Divorce.
BE it enacted by the Senate and House of Representatives, in General Court assembled, and by the authority of the, same, as follows:
SEC. 1. A divorce from the band of matrimony may be decreed, in favor of either party, whom the other shall have wilfully and utterly deserted for the term of five years consecutively, and without the consent of the party deserted.
SEC. 2. When a divorce is decreed for the cause of desertion by the husband as aforesaid, the same proceedings shall be had, touching the estate of the wife or the alimony to be allowed her, as in the case of divorce on account of the husband's being sentenced to confinement to hard labor, or from bed and board.

Statutes 1860, Chapter 107, Section 13, [pertinent part] "Libels for divorce shall be heard and determined in the supreme judicial court held for the county in which, or for two or more counties in either of which, the parties or one of them live. When heard before a single judge, either party may take exceptions in the same manner and with the same effect as in suits at common law."

Statutes 1882, Chapter 146, sect. 12. [pertinent part] When the libel [for divorce] is filed in vacation in the office of the clerk of the court, such attachment may be made upon the summons issued thereon, in the same manner as attachments are made upon writs in actions at common law

Statutes 1913, Chap. 563 [pertinent part]
An Act Relative To Illegitimate Children And Their Maintenance.
Be it enacted, etc., as follows:
Courts having jurisdiction of complaints in cases of maintenance, etc., of illegitimate children.
SECTION 1. Whoever, not being the husband of a woman, gets her with child shall be guilty of a misdemeanor.

Statutes (Acts) 1953, Chapter 505
AN ACT RELATIVE TO THE SUPPORT OF MINOR CHILDREN BY THEIR PARENTS.
Be it enacted, etc., as follows:
Section 8 of chapter 273 of the General Laws, as appearing in the Tercentenary Edition, is hereby amended by adding at the end the following sentence: —— The legal duty of the parent or parents to support a minor child shall continue, notwithstanding the absence of a court decree ordering them or either of them to pay for the

support of said child shall continue notwithstanding any court decree granting custody of such child to another; provided, however, that where decree stipulates an amount to be paid by them or either of them for said child's support they shall not be obligated in excess of that amount.

Statement of the Case:

This petition arises out of the fact that there is a clear contradiction between the historical fact that all family law matters were adjudicated under Common Law jurisdiction with the right to a trial by jury from the colonial period until relatively recently verses the dicta and 'modern' court rulings which fail to identify which provincial law, statute, or colonial charter overturned the Common Law rules which required a criminal act for the state to involve itself in citizen's lives. Instead, the state now says that these matters were always done under equity jurisdiction. Lacking any checks or balances[1], citizens are treated as slaves, deprived of rights, and left with no remedy for wrongs committed against them.

The state, with the complacent actions of the other defendants, deprives this petitioner and countless other 'non-custodial' parents from the most basic

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[1] "Power is the great evil with which we are contending. We have divided power between three branches of government and erected checks and balances to prevent abuse of power. However where is the check on the power of the judiciary? If we fail to check the power of the judiciary, I predict that we will eventually live under judicial tyranny." Patrick Henry

constitutional rights. This state created class of 'non-custodial' parents has been convicted of no wrongdoing. This deprived class of parents is treated harsher under equity jurisdictions than parents who were proven guilty of criminal actions under Common Law jurisdiction.

What is termed child support was, during the colonial period and well into the twentieth century, the Common Law matter of providing necessities for a child which always had the right to a trial by jury. But given that trial by jury was the birthright of every Englishman, deprivation of this birthright did not and could not have occurred during the colonial period without violating the legal charters under which the colonies operated.

Reasons for Granting the Writ:

The state uses unsupported, but often repeated, dicta to deprive tens of millions of parents, i.e., non-custodial parents, of the most basic and fundamental rights without identified or proven wrongdoing. Subsequently, non-custodial parents are routinely deprived of their personal liberties without Due Process of law[2]. 'Non-custodials' are cast into this state created class and then are arbitrarily deprived of their personal liberties, children, property, and treated as slaves not because of proven criminal acts to justify the intrusion of a percentage of their income, i.e., not challengeable necessities, but because of judicial discretion.

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[2] *Worcester v. Georgia*, 31 U.S. 515; (1832), "It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment; if punishment could disgrace when inflicted on innocence."

When the colonists first set foot on this continent, divorce, child support, and custody were Common Law determinations made because of an injury, a criminal breach of conduct, a violation of a natural law obligation, NOT state ideology, NOT judicial discretion, see *Lucas v. Lucas*, 69 Mass. 136 (1854) (divorce is a "...suit brought by one person against another to obtain redress for himself for an injury done him."); *Miller v. Miller*, 150 Mass. 111 (1889) ("Because the deserter is a wrongdoer, the law gives the deserted party a right to a divorce."). The Privy Council oversaw colonial laws and would overturn statutes or decisions that were repugnant to the laws of England[3]; including overturning divorces which were not done in Common Law Courts[4].

The changes to equity determination in Family Law have not met the strict scrutiny requirements per this court's rulings and have devolved Family Law into imposing ideology imposing punishment without wrongdoing.

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[3] "Our Divorce Courts: their Origin and History: Why They Are Needed: How They are Abused: and How They May Be Reformed", Page 39, By Judge Charles Cowley, Second Edition, Penhallow Printing Company, 1880.

[4] "The Review of American Colonial Legislation by the King in council", Elmer Beecher Russell, Columbia University, 1915, page 227 "The act of Parliament passed in 1696 "for preventing frauds, and regulating abuses in the plantation trade," asserted the nullity of any colonial law or usage which should be repugnant to acts of Parliament referring to the colonies. Statutes at Large 7 and 8 William III ch. xxii." AND page 172, "that acts of Divorce in the Colonies, more especially when there does not appear to have been any suit instituted in any ecclesiastical court nor any verdict in any court of Common Law, are either improper or unconstitutional.", citing A.P.C., vol. v, p. 366. Pa. Stats., vol.viii, p. 599; 7 April, 1773.

Ankenbrandt v. Richards, 504 U.S. 689 (1992) questions the origin of federal abstentions regarding Family Law. *Barry v. Mercein*, 46 US 103 (1847); *In re Burrus*, 136 US 586 (1890), and *In re Barry*, 42 F. 113 (1844) conclusively show that the abstentions originate in the federal court's lack of Common Law jurisdiction, not comity, not federalism, jurisdiction. Additionally these three cases claim that state courts are better equipped to handle the subtle variations of the Common Law in the various states.

Massachusetts searches and seizes money and property of 'non-custodial' parents without a hearing or even a pretext of hearing.

First Question

The state has eliminated all the protections against tyranny in what is now termed 'Family Law' that the founding fathers had put in place. The state exercises its will over natural and constitutional rights with impunity. Slaves are created out of fit parents and criminals are rewarded for crimes that once carried the penalty of capital punishment.

The Common Law right to a trial by jury was the only method for providing necessities for a child if a parent failed in their natural law obligation[5]. The laws of England, i.e., the Common Law, was inherited by the early colonists. There was no other mechanism in English law, except for Elizabethan

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[5] Kent's Commentaries on American Law, Volume 2, Part IV, Lecture 29, First Edition, specifically, "It [Child Support] will always be a question for a jury, ...".

Poor laws[6], for what is now termed 'child support'. It is a fundamental violation of the Constitution to deprive people of the ancient Common Law birthright to a trial by jury over these matters.

The adoption of the Common Law and absolute right to a trial by jury is clear:

> "There was also the limitation in the Charter that no laws should be made repugnant to the laws of England. This ... [meant] that no such laws should be passed as would be ... subversive of those great fundamental principles of English law which were considered to be the birthright of every Englishman, -- **such, for instance, as the right to trial by jury**."[7] [Emphasis added]

Thus it is impossible for the Common Law rule providing for necessities to a child to have any other method of adjudication other than trial by jury under British rule.

Many modern case law citations claim that there has never been a right to a trial by jury over child support. This claim is made without citing any charter, provincial law, or other organic legal document that changed this fundamental right to a trial by jury for providing necessities to a child. This claim also fails to address that the Common Law providing for necessities was the genesis of the concept of child support.

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[6] The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law, Drew D, Hansen, Yale Law Journal, March 1, 1999.

[7] John Noble, "Criminal Trials in the Court of Assistants and Superior Court of Judicature 1630-1700", John Wilson and Son, 1897, Page 5

Furthermore, there are many case law citations where third parties[8], towns, relatives, or strangers, sue a wayward parent for necessities for a child following a divorce. These cases involve a trial by jury. The jury had to agree that the item(s) were necessities and that the parent/spouse was wrong for not providing them. To impose the punishment of child support, the wrong was always proof of abandonment of the child(ren). Had the claim that child support never had the right to a trial by jury, these cases of trial by jury over necessities would not exist.

The state claims that since divorce was heard, prior to 1785, by the Governor and his Council all federal issues regarding child support are void, see *Bigelow v. Bigelow*, 120 Mass. 320 (1876). The state fails to acknowledge that 1) divorce was a separate and distinct matter from child support, 2) the Common Law history of Child Support, 3) the lack of any evidence of a grant, charter, law, or citation that the Governor ever imposed child support, 4) that the Governor and his Council constituted a common law court in the eyes of the Privy Council when adjudicating divorce, and 5) the case law which shows the right to a trail by jury over necessities for a child following a divorce.

Circa 1630, the Governor and his Council, acting as members of the Court of Assistants, had sole

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[8] *Hanover v. Turner*, 14 MA 227 (1817), "(Upon this evidence the judge instructed the jury, if they were satisfied by the evidence of the defendant's gross abuse of his wife, ...); *Burlen v. Shannon*, 115 MA 438 (1874); *Alley v. Winn*, 134 MA 77 1883), *Commonwealth v. Ham*, 156 MA 485 (1892); *Commonwealth v. Acker*, 197 MA 91 (1908)

jurisdiction over divorce, but no mention of jurisdiction over the Common Law method for providing necessities for a child. The Governor and his Council long had exclusive jurisdiction over divorce, but never any mention of providing necessities, i.e., what is now termed child support, in any of the grant of jurisdiction to the Governor and his Council. The Court of Assistants had criminal, civil – including Common Law, and appellate jurisdiction. Trail by juries were heard before the Court of Assistants.

The state uses case after case where a father – and only the father since mothers could not be held legally responsible to support children born of a valid marriage – abandons his child and is punished with child support without the right to a trial by jury post *Bigelow*.

Bigelow deprived men (because at that time only married men had a legal requirement to support their children) of the right to a trial by jury with unsupportable dicta. The right to a trial by jury over necessities was the only method for what is now termed child support. There is no statute, provincial law, grant, or charter that overturned this rule. There is no post colonial law that overturned this right to a trial by jury. Just unsupported dicta in *Bigelow* is used to deny the birthright of a trial by jury over necessities.

From a single Common Law action of providing necessities to a child, there were three separate and distinct types of child support:

1. Civil proceedings regarding providing necessities for a child had the right to a trial by jury.

2. Unmarried men were criminally responsible for providing support and had the right to a trial by jury (under criminal Bastardly and Begetting statutes).

3. Married men abusing or abandoning their children, the state contends, never had the right to a trial by jury.

Point 1 above has already been shown as being the starting point of all "child support" under the laws of England above. Additionally there are cases such as:

> "The court instructed the jury, upon these facts, that, if he made no suitable support for the child at home, he was liable for that which its mother procured to be afforded by the plaintiff." *Reynolds v. Sweetser*, 81 MA 78 (1860)

Point 2 can be shown with multiple cases such as *Hill v. Wells*, 23 Mass 104, 106 (1828):

> "One other consideration fully confirms us in this construction. By St. 1800, c. 44, the Court of Sessions for the county of Suffolk was deprived of a jury. If therefore the jurisdiction was not transferred in 1800 to the Municipal Court, but remained in the Sessions, the latter court was unable to execute the laws of bastardly, because, by the act, prosecutions under it were to be tried by jury; and the legislature had deprived the court in which alone they had vested the jurisdiction, of the means of trying the complaints in the only way in which by law they could be tried."

Historically, unmarried men did not pay the mother of the bastard child but instead posted a bond to the town against any possible future expenditures of the town to support the child, see Statutes 1692-3, c. 18, §5.

In 1672 the first law for providing for punishment of unmarried men with child support can be found in Provincial Laws (of 1672) (pages 54-55), specifically:

> "Whereas there is a Law provided by this Court for punishing of Fornicators, but nothing as yet for the easing of Towns, where Bastards are born, in regard of the poverty of the Parent or Parents of such Children sometimes appearing, nor any Rule held forth touching the refuted Father of a Bastard for legal conviction."

This is a criminal matter retaining the right to a trial by jury, also see Statutes 1692-3, c. 18 and Statutes 1913, c. 563. So there was no loss of the right to a trial by jury over providing necessities with this new provincial law. This remained the case for unmarried men until approximately 1980 when these criminal matters were illegally transferred into a court of equity with the resultant loss of the right to a trial by jury.

Regarding Point 3 above, child support as a punishment is a statutory construction of the laws[9]; again, prior to the statutory construction of child support as punishment, the only mechanism for necessities for a child in cases of abuse or abandonment was a trial by jury. Thus, following the state's logic, once child support as a punishment became statutory, these statutes unlawfully preempted the Common Law method of providing for necessities, i.e., trial by jury. But there is never any mention of the statute, charter, grant, or provincial law which first overcame the right to a trial by jury

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[9] *Brow v. Brightman*, 136 MA 187 (1884) and discussion regarding this case at 18 Cent. L.J. 469, 1884

over necessities. Only reliance on *Bigelow*'s dicta regarding no right to a trial by jury.

Such proceedings to collect child support could not be supported in England, see *Dennis v. Clark*, 56 MA 347 (1848) (doubting "whether such action could be maintained", i.e., child support hearings, in English courts) until the latter part of the nineteenth century.

Statutes 1953, c. 505 changed the Common Law rule which prohibited imposing child support or providing necessities to a child without showing some harm to the child, see *Kirby v. Kirby*, 338 Mass 263 (1959). Hence, until 1953, child support, civil or criminal, could only be imposed as a punishment for a criminal act of abuse or abandonment or as a civil punishment for neglect. The Common Law prohibited any type of child support without showing some harm to the child, see *Angel v. McLellan*, 16 Mass. 28 (1819), *Baldwin v. Foster*, 138 Mass. 449 (1885), *Creely v. Creely*, 258 Mass. 460 (1925).

The Petitioner in *Kirby* asked what happened to the Common Law rule, "... that a father who is deprived of the custody of his child by order of court has no common law duty of support."[10] Multiple Massachusetts cases were cited showing this rule's effect in Massachusetts law. The answer from the court was that St.1953, c. 505 changed the Common Law rule require showing harm to impose child support.

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[10] *Alvey v. Hartwig*, *106 Md. 254* (1907) ("[T]he right of the parent to the services of the children and the obligation of maintenance of the same, devolving upon the parent are reciprocal rights and obligations.")

Arguably all that Statutes 1953, c. 505 did was allow a civil trial by jury over a civil dispute over necessities or shared expenses for a child between divorced parents. Something that would not have been permitted under the Common Law because of the requirement of showing harm. But imposing the punishment of child support, reserved for the criminal act of abuse, abandonment, or neglect, without a showing of harm would violate the Sixth Amendment; however, a trial by jury would still be permitted over the civil matter.

Hence, until 1953, child support could only be imposed as a punishment for a criminal act of abuse or abandonment or civilly where harm was shown. This loss of the right to a trial by jury is a blatant violation of the social compact. It is a fundamental violation of Due Process and the Eighth Amendment to impose what is historically a punishment without identified and proven wrongdoing.

Sanctions for abuse or abandonment meets this court's definition of punishment but what purpose does punishing one parent regardless of their actions?

Subjecting tens of millions of people to arbitrary punishment and the loss of the right to a trail by jury is a fundamental violation of the social compact of this nation.

Second Question

The state is violating the Due Process rights of parents by imposing the punishment of removing a fit parent from the life of a child. The state is also violating the Ninth and Tenth Amendment when it

interferes with the parent-child relationship except for the case of rescuing the child.

This court twice stated in parental custody cases, relying on *In re Barry*, 42 F. Cas. 945 (1844), that it is a violation of Due Process to adjudicate custody under any jurisdiction but Common Law, see *Barry v. Mercein*, 46 US 103 (1847); *In re Burrus*, 136 US 586 (1890). Both of these case use *In re Barry*'s assertion that *parens partiæ* requires Common Law jurisdiction. Another view of custody jurisdiction supporting this is *Ex Parte Barry*, 43 U.S. 65 (1844). Specifically in *Burrus*:

> "Judge Betts, who delivered a very careful and a very able opinion, which has been furnished to us, in which he held that his court could not exercise the common law function of parens patriæ, and therefore had no jurisdiction over the matter, ...", *In re Burrus*, 136 US 586 (1890)

With Judge Betts stating:

> "I close this protracted discussion by saying that I deny the writ of *habeas corpus* prayed for because (1) if granted, and a return was made admitting the facts stated in the petition, I should discharge the infant on the ground that this court cannot exercise the common-law function of *parens patriæ*, and has no common-law jurisdiction over the matter ...", *In re Barry*, 42 F. 113 (1844)

Note that the *In re Barry* decision was appended in its entirety to the *In re Burrus* decision.

No other jurisdiction could be found by this court which permitted the state to interfere as *parens*

patriæ except Common Law jurisdiction, even taking into account the foreign citizenship of one of the parents, not even equity jurisdiction.

Mercein v. Barry, 25 Wend 64 (1840) is the New York state case that leads to *In re Barry* and *Barry v. Mercein*. In it you find nineteen pages of debate between which Common Law rules should be followed. The Common Law rules which had been in place since time immemorial or the new invention from England, the "Tender Years Doctrine". A new set of rules based on a reinterpretation of the laws of nature, not judicial discretion. Just new Common Law rules:

> "The **law of nature** has given to her an attachment for her infant offspring which no other relative will be likely to possess in an equal degree. And where no sufficient reasons exist for depriving her of the care and nurture of her child, **it would not be a proper exercise of discretion in any court to violate the law of nature** in this respect" [Emphasis added], *Mercein v. Barry*, 25 Wend 64 (1840)

An equally clear description of this jurisdictional issue can be found in *Cocke v. Hannum*, 39 Miss. 423 (1860)[11]:

> "The legal question presented by the record in this cause must be examined by the light of the decisions of the courts of common law, and not by

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[11] And later noting: "There cannot be a tyranny more grievous than that which would be wrought by judges, if allowed to determine the proper custody of a child by running a parallel between the merits of contending parties."

that of decisions in courts of equity, acting on their claim to jurisdiction over infants as representing the parens patriae."

Best Interest under Common Law jurisdiction never imposed any restrictions on personal liberties[12] nor child support. But more importantly, Common Law Best Interest was never used to interfere with the natural right to custody. Under Common Law jurisdiction rescuing a child was the only valid implementation of *parens patriæ*. Best Interest under Common Law jurisdiction first had to address the question of natural right and the right of property. Only if no one retained a natural right, then and only then could the state act "in the best interest of the child"[13].

Best Interest under Common Law jurisdiction first had to address the question of natural right. Only if no one retained a natural right, then and only then, could the state act "in the best interest"[14]. "Best Interest" determinations under Common Law jurisdiction were made to rescue a child who lacked a legal guardian not the unbounded imposition of judicial discretion.

Also note that in cases such as *Purinton v. Jamrock*, 195 Mass. 187 (1907) and *In re Campbell*, 130 Cal. 380 (1900) before the state could make any "Best Interest" determination it not only had to show that the parent no longer had valid custody rights but that the 'right of property' with regard to the

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[12] *Hibbette v. Baines*, 78 Miss. 695 (1900) analyzing over 40 cases across the country.

[13] Ibid

[14] Ibid

parent-child relationship was also void. This Common Law right of property is not the vulgar concept of possession but a legal concept involving specific protections[15]. The state has failed to address how this right of property, protected under the Fifth Amendment, can be so easily dissolved in civil cases under equity.

Going from criminal and civil punishments for criminal behavior, e.g., abuse, abandonment, or adultery, to judicial discretion based on perception of relative parental abilities is a violation of Due Process. This claim of shifting the burden of proof and burden of persuasion is a violation of Due Process which impacts personal liberties and multiple other Constitutional rights. These issues must be addressed by this Court.

Third Question

The Privy Council required that divorce be adjudicated in Common Law or Ecclesiastical courts to be considered "constitutional"[16]. Common Law adjudication of divorce remained the case post-revolution[17].

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[15] "Ownership", Oxford Essays in Jurisprudence, A.M. Honore, 1961, 1967.

[16] "The Review of American Colonial Legislation", Elmer Beecher Russell, Columbia University, 1915, page 172, "that acts of Divorce in the Colonies, more especially when there does not appear to have been any suit instituted in any ecclesiastical court nor any verdict in any court of Common Law, are either improper or unconstitutional.", citing A.P.C., vol. v, p. 366. Pa. Stats., vol.viii, p. 599; 7 April, 1773.

[17] Statutes 1785, c. 69; Statutes 1835, c. 76; Statutes 1860, c. 107; Statutes 1882, c. 146

Divorce, for the religious people who founded Massachusetts, was not only a crime against God, and nature, but a crime in a court of law. Under the Common Law, any person committing a crime which then justified a divorce would have been barred from support or alimony since that would have been seen as benefiting from one's crime.

The state judiciary failed to cite a single case of the Governor imposing child support or statute which changed this right to a trial by jury to support the claim found in *Bigelow* and it progeny and failed to note the long history of the Privy Council requiring divorce be done in a Common Law court[18] and the Governor's involvement; thus, the Privy Council acknowledging the Governor and his Council as a court of Common Law jurisdiction from 1630 till at least 1776. Divorce in England was not limited to ecclesiastical courts[19]. Divorce could be had in Common Law courts as well.

Punishment for divorce in the colonies included: banishment (in English criminal law this was an alternative to death), whipping, prison, fines, and the guilty party could never remarry[20]. Clearly divorce was a criminal proceeding given the types of punishments. In all the Court of Assistant

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[18] Ibid

[19] "It was held by the whole court, in *Houliston v. Smyth,* 3 Bing. 127, that where the wife leaves the husband, under such an apprehension of personal violence, **as a jury shall deem to have been reasonable**, her husband is liable for necessaries for her support." [Emphasis added]. *Pidge v. Pidge*, 44 Mass. 257 (1841)

[20] "Our Divorce Courts: Their Origin and History: How They are Abused and How They May Be reformed,", Second Edition, Judge Charles Cowley, Penhallow Printing Company, 1890

proceedings there is no case assigning child support. There is no Provincial Law changing the Common Law method for providing for necessities, i.e., child support, except for unmarried men[21].

Between 1785 and 1824 divorce was exclusively heard under the criminal jurisdiction of the SJC, see *Pidge v. Pidge*, 44 Mass. 257 (1841). Thus at the signing and ratification of the US Constitution Family Law was a criminal matter under the sole jurisdiction of the SJC, see *Barber v. Root*, 10 MA 260 (1813) ("Regulations on the subject of marriage and divorce are rather parts of the criminal, than of the civil, code; ...") and *Harvard v. Head*, *111 Mass. 209 (1872)*, ("Divorce proceedings are criminal in their nature, and the public is a party.), and thus is entitled to Sixth Amendment protections.

The Governor and his Council and the SJC were imposing life-long, criminal punishments under the Common Law, for criminal actions in accordance with historical precedence established by the Privy Council and laws of England. These punishments included eliminating: the right to marry again, the natural right to have sex (since the right to have sex was tied to marriage), and the right to beget legitimate children.

Arguably, given that the matter was transferred under the criminal jurisdiction of the SJC in 1785, additional weight to the argument that the Governor and his Council were in fact implementing a

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[21] *Hill v. Wells*, 23 Mass 104, 106 (1828) "In 1692 the provincial legislature, in revising the colonial laws, include provisions in relation to bastardy, in "an act for the punishing of criminal offenders," ... "

criminal, not civil, process accordance with historical precedence established when Massachusetts was an English colony.

In *Pidge v. Pidge*, 44 Mass. 257 (1841), the case which cites Statutes 1838, c. 126 as "great change is introduced, and a divorce from the bond of matrimony may be now decreed without any crime having been committed by the libellee", the right to a trial by jury is clearly stated regarding who, jury or judge, determines the facts of a divorce:

> "It was held by the whole court, in *Houliston v. Smyth,* 3 Bing. 127, that where the wife leaves the husband, under such an apprehension of personal violence, **as a jury shall deem to have been reasonable**, her husband is liable for necessaries for her support." [Emphasis added]. *Pidge v. Pidge*, 44 Mass. 257 (1841)

Hence the Common Law matter of divorce did have a trial by jury over the interpretation of the facts both in England and in the Colonies. Also see *Hanover v. Turner*, 14 MA 227 (1817), *Commonwealth v. Ham*, 156 MA 485 (1892)

The conversion from a criminal matter to a civil matter should have 1) preserved the right to a trial by jury under the Sixth Amendment and 2) preserved the right to a trial by jury as a 'new' civil matter under the Sixth Amendment and Article XV.

Furthermore, *Bigelow* explicitly acknowledges that the matter is under Common Law jurisdiction. The plaintiff in *Bigelow* raised the issue of the Seventh Amendment right to a trial by jury. *Bigelow* fails to acknowledge the long history of Common Law adjudication by the Governor and his Council and

the Privy Council mandate. Article XV of the Massachusetts Constitution prohibits the transferring of Common Law matters into equity.

Going from punishment for criminal behavior to arbitrary judicial opinion violates Due Process, imposes arbitrary restrictions on personal liberties, imposes punishment without wrongdoing, and a host of other Constitutional violations. What we have now is state ideology backed-up with police power versus what was originally conceived as a social compact to protect individual rights.

This court has said that civil punishments must have some deterrent and remedial aims, see *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, (1963) (a seven part test). And also, *United States v. Halper*, 490 U.S. 435, (1989). But the state courts' goal is not civil punishment of the state created, disadvantaged class of "non-custodial" parents but **civil rewards** to those that generate more Title IV-D money for the judiciary (see the discussion of Department of Revenue v. Ryan R., *infra*).

Punishment of innocent people serves no purpose. If divorced parents have a civil dispute over some shared expense for a child a trial by jury is the proper and Constitutional mechanism. Punishment without proven wrongdoing is a violation of the Eighth Amendment and Due Process. Changing the jurisdiction has violated the Ninth and Tenth Amendments.

The case of Department of Revenue v. Ryan R., 62 Mass. App. Ct. 380 (2004) shows a married woman who has an affair, gets pregnant from her lover, which results in a divorce proceeding, where the

husband has to pay child support even though everyone, including the court, knows he is not the father. This case misrepresents British Common Law and ignores MA case law as far back as the Court of Assistants[22] which punished women for fraud if they tried to pass off illegitimate children on their husbands. Also statutes from the 1700 through the 1800's provided for a trial by jury to challenge legitimacy, with a trial by jury to determine legitimacy, not a judge or judiciary who benefits from Title IV money.

In an additional perversion of justice in this case, the state then goes after the biological father for child support as well. So the crime of adultery is rewarded by the state with custody and two tax-free child support checks[23] for the same child. Collateral damage is an innocent ex-husband who is punished so that additional Title IV monies are funneled to judicial coffers, the elimination of his right to a trial by jury regarding support and legitimacy, and an unmarried man who is forced to pay child support without the right to a trial by jury.

Probate and Family courts have devolved into Ecclesiastical Courts by imposing Soviet style

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[22] 11 March 1673, the case of Ruth Reed, "Criminal Trials in the Court of Assistants and Superior Court of Judicature 1630-1700", John Noble, John Wilson and Son, 1897; *Commonwealth V. Merriam*, 31 MA 518 (1833) "Chief Justice *Raymond* allowed evidence that the mother was of bad fame, to rebut the presumption of legitimacy, and the jury found the plaintiff to be illegitimate."

[23] Isaiah 5:20 - Woe to those who call evil good, and good evil; Who put darkness for light, and light for darkness; Who put bitter for sweet, and sweet for bitter!

dogma[24] over the natural rights, not identifying an injury for the court to act on, and rewarding behavior which increases Title IV remunerations[25].

Since both in England and in the colonies, divorce was permitted under Common Law jurisdiction, with the right to a trial by jury, the state cannot has eliminated the birthright of trial by jury and replaced it with state Ideology, i.e. "Best Interest" modeled after Soviet style divorce, and impose punishment without wrongdoing to the satisfaction of a jury of one's peers.

The recent non-binding referendum on shared parenting in the Commonwealth – the vote was a whopping 85% in favor of shared parenting. But the judiciary opposes any changes, regardless of such strong public opinion due to the loss if Title IV revenue.

Fourth Question

Per the attached rulings, the state clearly thinks that taking property without a hearing is well within the state's power. No court has ever determined if the amounts taken were fair or appropriate. The state tries to justify this unconstitutional action by stating that since this Petitioner asked for the 'wrong' kind of hearing, the state does not have to offer any hearing. This violates the Fourth and Fifth Amendments to the US Constitution.

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[24] "No-Fault Divorce: Born in the Soviet Union?", Journal of Family Law, University of Louisville School of Law, Volume Fourteen 1975 Number One.

[25] *Department of Revenue v. Ryan R.*, 62 Mass. App. Ct. 380 (2004)

Fifth Question

All parties did knowingly act in concert to deprive this Petitioner of Constitutional rights. Each participant benefited from these actions. These actions were done under color of law, color of authority. Thus a conspiracy existed to deprive the Petitioner of Constitutional rights.

Conclusion:

The loss of the right to a trial by jury and the loss of rights of a state created class called 'non-custodial' parents by tens of millions of parents warrant a full and fair determination of the issues raised above. Equity determinations have unconstitutionally separated the Common Law defined obligations from corresponding reciprocal rights, preempted the right to a trial by jury, and inflicted punishments without wrongdoing and hence have no valid remedial justification. The change in jurisdiction violates two standing precedents from this court. The changes made to Family Law have not met the strict scrutiny requirements. Instead the state imposes punishment based on ideology and derives an independent revenue stream.

The state's use of lies, dicta, and "Best Interest" has made state ideology more important than the constitution and the law, e.g., providing remedy for injury. Providing necessities for a child always had the right to a trial by jury under the Common Law. Divorce was not only a crime but a violation of Holy Scripture; thus a grave matter for the religious people who started Massachusetts Bay colony. Custody was only interfered with to rescue a child, not a method to arbitrarily punish one parent.

For the foregoing reasons, petitioner prays that this Court grant a writ of certiorari to review the validity of the judgments and the proceedings of the state courts including the dismissal from the Massachusetts Supreme Judicial Court issued on 11 September 2009.

Respectfully submitted,

Mark Cimini, Pro Se
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Westford, MA 01886
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m.cimini@att.net
November 21, 2009

Appendix

Appendix A – Supreme Judicial Court FAR denial
Appendix B – Massachusetts Appeals Court Opinion
Appendix C – Superior Court Second Opinion
Appendix D – Superior Court First Opinion
Appendix E – Referenced Mass. Attorney General Motion
Appendix F – Relevant Portion of Fidelity's Brief

Supreme Judicial Court for the Commonwealth of Massachusetts
John Adams Courthouse
One Pemberton Square, Suite 1400, Boston, Massachusetts 02108-1724
Telephone 617-557-1020, Fax 617-557-1145

Mark Cimini
12 Maple Road
Westford, MA 01886

RE: Docket No. FAR-18090

MARK CIMINI
VS. MARILYN RAY SMITH **& others**

Middlesex Superior Court No.
MICV2007-00284 A.C. No.
2008-P-1733

NOTICE OF DENIAL OF F.A.R. APPLICATION

Please take note that on September 10, 2009, the above-captioned Application for Further Appellate Review was denied, (Cowin, J., recused)

/Signed/
Susan Mellen, Clerk

Dated: September 11, 2009

To: Mark Cimini
Charles M. Wyzanski, Esquire
Kerry D. Florio, Esquire
Patrick J. Dolan, Esquire
Gerald Venezia, Esquire

COMMONWEALTH OF MASSACHUSETTS THE SUPERIOR COURT

MIDDLESEX, ss.

CIVIL ACTION No. 07-CV 0284-L

MARK CIMINI, Plaintiff

v.

MARYLIN[26] RAY SMITH,
in her Professional and Individual Capacities,
MASSACHUSETTS DEPARTMENT OF REVENUE,
COMMONWEALTH OF MASSACHUSETTS,
FIDELITY INVESTMENTS, and MARGARET CIMINI,
Defendants

MEMORANDUM OF DECISION AND ORDER ON THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Introduction

Mr. Mark Cimini has filed a 42 U.S.C. §1983 action, *pro se,* against the Commonwealth of Massachusetts, the Massachusetts Department of Revenue and Marylin Ray Smith in her official and individual capacities. He alleges that his First, Sixth Amendments and Due Process rights were violated by the department's refusal to provide him a jury trial on the issues of child support, liens placed on his property, and the seizure of $6,245 from his Fidelity retirement account.

I. Uncontroverted Facts

Mr. Mark Cimini and Margaret Cimini were married in March 1993. In 1998, Mr. Cimini obtained a temporary order of joint custody, at

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[26] Misnamed Marylin in the complaint; the true name is Marilyn

which time a temporary order of support was also entered. Mr. and Mrs. Cimini divorced in January 2000.

In April 2004, Mr. Cimini requested that a clerk in the Middlesex County Probate and Family Court schedule a hearing on the issue of modification of the custody and support orders; the clerk refused. Later that same year, the Massachusetts Department of Revenue notified Mr. Cimini that he was in arrears on his child support. He repeatedly requested that the Department convene a jury trial for him on the issue of child support. Ultimately, the Department, acting through Smith in her official capacity, placed liens on Mr. Cimini's financial accounts and seized over $6,245 from his Fidelity retirement account.

II. The Summary Judgment Standard

A court should grant summary judgment where the record, including pleadings, depositions, answers to interrogatories, admissions on file and affidavits, shows that there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Mass. R. Civ. P. 56 *(c). Cassesso v. Commissioner of Corrections,* 390 Mass. 419, 422 (1983); *Community National Bank v. Dawes,* 369 Mass. 550, 553 (1976). The moving party has the burden of demonstrating the absence of a genuine issue as to any material fact and that it is entitled to have questions of law resolved in its favor. Mass. R. Civ. P. 56*); Kourouvacilis v. General Motors Corp.,* 410 Mass. 706, 711 (1991); *Ford Motor Company v. Barrett,* 403 Mass. 240, 242 (1988). The moving party may satisfy this burden by submitting affirmative evidence that negates an essential element of the

opposing party's case by demonstrating that the opposing party has no reasonable expectation of proving an essential element of his case at trial. *Flesner v. Technical Communications Corporation,* 410 Mass. 805, 809 (1991); *Kourouvacilis,* 410 Mass, at 716.

Once the moving party establishes the absence of a triable issue, the party opposing the motion must respond and allege specific facts establishing the existence of a genuine issue of material fact in order to defeat the motion. *Pederson v. Time, Inc.,* 404 Mass. 14, 17 (1989). The nonmoving party cannot defeat the motion for summary judgment by resting on his or her pleadings and mere assertions of disputed facts. *LaLonde v. Eissner,* 405 Mass. 207, 209 (1989). The court must construe facts in the light most favorable to the nonmoving party.

Harrison v. NetCentric Corp., 433 Mass. 465, 468 (2001); *Ford Motor Company,* 403 Mass, at 242.

There are no genuine issues of material fact here. Summary judgment is, therefore, appropriate.

III. Discussion

A. Mr. Cimini Has No Viable 42 U.S.C. § 1983 Cause of Action.

Mr. Cimini's 42 U.S.C. §1983 action claims that the Department of Revenue and Marylin Ray Smith violated his rights. However, none of these defendants are "persons" who may be sued under 42 U.S.C. §1983.

Section 1983 provides that:

"Every ***person*** **who, under color of any statue, ordinance, regulation, custom, or usage, of any State... subjects, or causes to be subjected, any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a action at law, suit in equity, or other proper proceeding for redress."** 42 U.S.C. Section 1983 (emphasis added).

The United States Supreme Court has construed "person" to exclude states, state agencies, and state officials acting in their official capacity. *Will v. Michigan Department of State Police,* 491 U.S. 58, 70-71 (1989); *Rosario-Urdaz v. Rivera-Hernandez,* 350 F.3d 219, 221-222 (1st Cir, 2003). In this case, the Commonwealth of Massachusetts, the Department of Revenue and Marylin Smith in her "professional" capacity, are not "persons" as defined in 42 U.S.C. section 1983.

B. Marylin Ray Smith, Acting In Her Individual Capacity, Did Not Violate Mr. Cimini's Constitutional Rights.

Mr. Cimini claims that the state Department of Revenue's failure to afford him a jury trial violated his rights under the First and Sixth Amendments and the Due Process Clause to the United States Constitution.

Mr. Cimini's First Amendment rights - the right to petition, the right to free speech and the right to free association - are not implicated in the facts in his complaint, and thus, they could not plausibly be said to have been violated. Mr. Cimini was not denied the

right to petition; to the contrary, he obtained temporary orders in the Middlesex County Probate and Family Court. He was not denied the right to free speech; he has openly expressed dissatisfaction with the decision of a state agency. He has not been denied the right to free association; nor could it rationally be so alleged.

Additionally, Mr. Cimini's claim that his Sixth Amendment rights were violated is also simply wrong. The Sixth Amendment concerns criminal prosecutions; it does not apply to civil proceedings such as here involving custody or child support. *See Austin v. United States,* 509 U.S. 602, 608(1993).

Finally, Mr. Cimini's due process rights were not violated. He was afforded a hearing in the Middlesex County Probate and Family Court. After that hearing, a judge determined the amount of Mr. Cimini's child support obligations. He was later informed that his failure to pay the arrearage could result in a lien, levy, or seizure of his personal property. He was further notified that he could request an administrative review of the department's actions. He sought no such administrative review, but rather, insisted on a jury trial.

There is simply no right - as a matter of federal constitutional law or state law -either to order Ms. Smith or the department to grant Mr. Cimini a jury trial. *See Department of Revenue v. Jarvenpaa,* 404 Mass. 177,187 (1989) citing *Bucknam* v. *Bucknam,* 176 Mass. 229,230-231(1900).

ORDER

For the foregoing reasons, Mr. Cimini's claims against Marylin Ray Smith (individually and "professionally" *(sic)*, the Massachusetts Department of Revenue and the Commonwealth of Massachusetts are hereby DISMISSED.

COMMONWEALTH OF MASSACHUSETTS
MIDDLESEX, SS.

SUPERIOR COURT
CIVIL ACTION NO. 07-0284
MARK CIMINI, Plaintiff
vs.
SMITH, HER PROFESSIONAL & INDIVIDUAL CAPACITIES ET AL,
Defendant

MEMORANDUM OF DECISION AN ON PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

This case comes to the Court at the request of Plaintiff Mark Cimini ("Plaintiff") to grant his motion for default judgment and assessment of damages against Defendant Margaret Cimini ("Defendant") pursuant to Mass. R. Civ. P. 54 and 55. Plaintiff requests this motion as a result of the Defendant's failure to answer a complaint filed by Plaintiff Cimini on January 24, 2007. Plaintiffs complaint is, in essence, a 42 U.S.C. § 1983 action where he alleges that Defendant Cimini has violated his First Amendment, Sixth Amendment and Due Process Rights because the "conversion"" of family law matters from Criminal and Common Law to "The Probate and Family Court"' is unconstitutional. Plaintiffs complaint also alleges that Defendant Cimini has engaged in *a* conspiracy against him as defined by 18 U.S.C. §241 and 18 U.S.C. §1961. Per the Court's exercise of its own discretion, the Plaintiff s motion or default judgment and assessment of damages against Defendant Cimini is **DENIED** and the complaint filed by the Plaintiff on

January 24. 2007 is **DISMISSED** pursuant to Mass. R. Civ. P. 12(b)(6).

BACKGROUND

Plaintiff Mark Cimini and Defendant Margaret Cimini were married in March of 1993, and subsequently divorced in January of 2000. In April 2004, at the Middlesex Probate and Family Court denied Mr. Cimini's request for a hearing regarding modification of his custody and support orders. Later in 2004 the Massachusetts Department of Revenue ("DOR") notified Mr. Cimini that he was in arrears on his child support order. After being denied a jury trial on the matter, the DOR placed liens on the Plaintiffs financial accounts and seized over $6,245 from his Fidelity investment account.

On January 24, 2007 Plaintiff brought the present action against the DOR, Ms. Marilyn Ray Smith in her professional role with the DOR, Fidelity Investments, and Ms. Margaret Cimini. Plaintiff alleges that the DOR's act of attaching his investment account for child support was an unconstitutional taking of his property and deprived him of his natural right to purchase items for his survival. Similarly, Plaintiff argues that the State granting divorces to couples, when one party does not desire the divorce and subsequently presiding over child custody matters violates several of his constitutional rights. Lastly, Plaintiff alleges that the Defendants were involved in a conspiracy against him as evidenced in the aforementioned claims. Plaintiff seeks billions of dollars in civil law violations and $1,139,975.14 from Defendant Cimini. All Defendants in this action have been previously

dismissed by a decision of Curran, J., except for Defendant Cimini.

DISCUSSION

The court has the power - on its own - to dismiss the Plaintiffs complaint, and vacate the Plaintiffs motion for Default Judgment. Despite the absence of a specific statute or rule, "a judge has the right and the duty to keep the judicial system in efficient operation." *State Realty Co. v. MacNeil Bros.,* 358 Mass. 374, 379 (1970). A judge has the power to dismiss a complaint on his/her own initiative. *National Grange Mut Ins. Co. v. Walsh,* 27 Mass. A.pp. Ct. 155,157 (1989). Similarly, the court has the power, when good cause is shown, to set aside an entry of default. Mass. R. Civ. P. 55(c). Therefore, it is within the court's "inherent power" to set aside the order of default against the Defendant and dismiss Plaintiffs complaint, and I hereby so order.

A. DEFAULT JUDGMENT

A motion for default may be entered only against a party who has "failed to plead or otherwise defend." Mass. R. Civ. P. 55(a). Plaintiff is correct in his allegation that Defendant Cimini failed to answer or otherwise defend against the Plaintiffs complaint. However, as indicated, a court has the power, when good cause is shown to set aside an entry of default. Mass. R. Civ. P. 55(c). Further, "on motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding" when there has been excusable neglect... or "any other reason justifying relief from the operation of the judgment." Mass. R. Civ. P. 60(b). The Court has good reason to set aside the

Plaintiffs motion for default judgment. The Court finds that Ms. Cimini's inability to retain counsel, and the possibility that she did not have notice of the complaint constitute excusable neglect. Also, Plaintiffs complaint fails to present a claim for which relief can be granted pursuant to Mass. R. Civ. P. 12(b)(6), and. hence relief in this instance would be inappropriate. Therefore, Plaintiffs motion for default judgment is Denied.

B. COMPLAINT DISMISSED

Plaintiff's complaint is dismissed for a failure to state a claim upon which relief can be granted. In order to dismiss a complaint for failure to state a claim, pursuant to Mass. R. Civ. P. 12(b)(6) the Court must, "accept all well-pleaded allegations of the Complaint as true, construe those allegations in the light most favorable to Plaintiffs" and only dismiss the complaint if it "appears with certainty that [the] Plaintiff can prove no fact that would entitle [him] to recover." *CitiCorp North America v. Ogden Martin Systems,* 8 F.Supp.2d 72, 74 (Mass. 1998). There are several reasons why Plaintiffs complaint fails to state a claim for which relief can be granted.

Plaintiff claims that the conversion of family law matters from Common Law and Criminal Law to a court of equity has violated his constitutional rights. This argument by Plaintiff Cimini does not state a claim against the Defendant. Defendant Cimini has not participated in a transformation of the family law system; rather, she has merely used a system that exists. Plaintiffs claim against Defendant Cimini is dismissed because the Defendant is merely

a party of interest within the Probate and Family Court, not an executor of it.

Second, Plaintiff seeks individual recovery for his alleged constitutional rights violations resulting from the Probate and Family Court Orders stemming from the Defendant and Plaintiffs aforementioned divorce, custody, and child support orders. Plaintiff has failed to state a claim against Defendant Cimini because there is no individual right of recovery against a party who has used a court institution for relief. Therefore, Plaintiffs claim is dismissed for a failure to state a claim upon which relief can be granted because the Defendant did not create the aforementioned orders or system, and as such there is no right to individual recover against her.

Additionally, Plaintiff's 42 U.S.C. §1983 action fails to state a claim against the Defendant because such actions can only be brought against state actors. Section 1983 provides that "every person who, under the color of *any statute ordinance, regulation, custom or usage, of any State...* Subjects or causes to be subjected any citizen of the United States... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in a action at law, suit in equity or other proper proceeding for redress. 42 U.S.C. §1983 (Emphasis Added). Defendant Cimini did not act "under the color of the law" as a state actor when she utilized the Probate and Family Court during her family court proceedings; therefore, she is not liable under Section 1983.

Lastly, Plaintiffs 18 U.S.C. §241 and 18 U.S.C, §1961 claims fail to state a claim against the Defendant.

Section 241 defines the crime of conspiracy as "two or more persons who conspire to injure ..." 18 U.S.C. §241. Plaintiff has failed to state a claim against the Defendant because there is no evidence that Plaintiff conspired with other parties to violate the Plaintiffs constitutional rights. Plaintiffs §241 claim is dismissed because it fails to evidence the plural party requirement of conspiracy. Similarly, Plaintiffs §1961 claim fails to state a claim upon which relief can be granted. A person has engaged in racketeering when they have engaged in "an act or threat involving murder, kidnapping, gambling, ..." 18 U.S.C. §1961. Plaintiff Cimini has failed to state a claim of "racketeering" against the Defendant because the Defendant's participation in the Probate and Family Court did not give rise to any of the elements defined in Section 1961.

ORDER

After closely examining the pleadings, and the standards of review I am bound by, the Plaintiffs motion is **DENIED** and the corresponding complaint **DISMISSED**.

By Order of the Court,
/Signed/
Hon. Isaac Borenstein
Justice of the Superior Court

Dated: July 21, 2008

COMMONWEALTH OF MASSACHUSETTS APPEALS COURT

08-P-1733

MARK CIMINI

vs.

MARILYN RAY SMITH and others

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, Mark Cimini, brought this action against Fidelity Investments (Fidelity), the Commonwealth of Massachusetts, the Department of Revenue (DOR), Marilyn Ray Smith, and Margaret Cimini. The plaintiff appears to assert violations of constitutionally based rights and guarantees by virtue of not having been afforded a trial by jury as to the amount of his child support obligation, by the placement of liens on his property, and by the seizure of over $6,000 from his Fidelity account. The claims all have been dismissed and the plaintiff appeals.

For substantially" the reasons set forth in Fidelity's brief at pages 5 through 15, and in the memorandum of law in lieu of brief submitted by the Commonwealth, the DOR, and Smith, we discern no merit in the plaintiff's contentions and affirm.

In her individual and official capacities.

Massachusetts Department of Revenue, Commonwealth of Massachusetts, Fidelity Investments, and Margaret Cimini.

Judgment and orders affirmed.

By the Court (Lenk, Dreben & Hanlon, JJ.),

Clerk Entered: June 30, 2009.

COMMONWEALTH OF MASSACHUSETTS
THE APPEALS COURT
No. 2008-P-1733

MARK CIMINI

Plaintiff-Appellant

V.

MARILYN RAY SMITH & OTHERS

Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE MIDDLESEX SUPERIOR COURT

DEFENDANTS-APPELLEES' MEMORANDUM OF LAW IN LIEU OF A BRIEF

I. Statement of the Case

Mark Cimini ("Mr. Cimini") brought this 42 U.S.C. § 1983 action, pro se, against the Commonwealth of Massachusetts (the "Commonwealth"), the Massachusetts Department of Revenue (the "DOR"), and Marilyn Ray Smith ("Ms. Smith"), in her official and individual capacity (collectively referred to as the "state defendants"), as well as against Margaret Cimini and Fidelity Investments. Mr. Cimini alleged that the state defendants had violated the First and Sixth Amendment and the Due Process Clause of

on his child support.[7] Mr. Cimini repeatedly demanded of the DOR that he be afforded a jury trial as to the amount of his child support, not a mere administrative hearing.[8] The DOR, acting through Ms. Smith, subsequently placed liens on several of Mr. Cimini's financial accounts and eventually seized over six thousand dollars in his Fidelity Investments account.[9] III. Argument

A. The Applicable Standard of Review

The standard of review of a grant of summary judgment is "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Cargill, Inc. v. Beaver Coal & Oil Co., 424 Mass. 356, 358 (1997); see Mass. R. Civ. P. 56(c), as amended, 436 Mass. 1404 (2002). By that standard, the summary judgment entered by the Superior Court should be affirmed for the reasons which follow.

[7] Id., 12-13.

[8] id., 13.

[9] Id., 13-14.

excluded for the same reason. Rosario-Urdaz v. Rivera-Hernandez, 350 F.3d 219, 221-22 (1st Cir. 2003). Accordingly, the Superior Court was correct in granting the state defendants summary judgment and that judgment should now be affirmed.

C. Ms. Smith, Acting In Her Individual Capacity, Did Not Violate Mr. Cimini's Constitutional Rights

Mr. Cimini claims that the failure to afford him a jury trial as to the amount of his child support, the placement of liens on his property, and the seizure of over six thousand dollars from his Fidelity Investments account violated his rights under the First and Sixth Amendments and the Due Process Clause to the United States Constitution.[12]

Mr. Cimini fails to anywhere specify a clause of the First Amendment,[13] but only the right to petition or the right to free speech could be thought to apply. Mr. Cimini, however, was not denied the right to petition. He was able to obtain temporary orders in the Middlesex Probate and Family Court ("Middlesex").[14] Whether or not Mr. Cimini was subsequently refused a hearing for the

12 s.a. 1-5.

13 s.a. 1-3.

14 S.A. 12.

modification of these temporary orders, would not implicate the First Amendment. Those orders were based on particularized facts, not on any pervasive or systemic conduct by a public agency or official. It must not be supposed that every legal pleading "comes trailing clouds of First Amendment glory." Yatvin v. Madison Metropolitan School Dist., 840 F.2d 412, 420 (7th Cir. 1988).

Mr. Cimini's reliance on other Amendments is likewise misplaced. The Sixth Amendment explicitly relates to "criminal prosecutions." It has no application to civil proceedings, such as those involving custody or child support. See Austin v. United States, 509 U.S. 602, 608 (1993). The Seventh Amendment provides for trial by jury in civil suits, in federal court only. Its guarantee has never been extended to the states through the Fourteenth Amendment. Letendre v. Fugate, 701 F.2d 1093, 1094 (4th Cir. 1983) .

Mr. Cimini's Fifth Amendment Due Process argument is equally unavailing. Mr. Cimini was informed that his failure to pay the arrearages could result in a lien, levy, or seizure of his personal property and that he was entitled to an administrative review.[15] Mr. Cimini effectively waived such a hearing/ when he repeatedly insisted on a trial by jury, not a mere administrative hearing.[16] Neither Ms. Smith nor the DOR had the authority to grant Mr. Cimini a jury trial, as a matter of federal constitutional law, as explained at page 6 above. Nor did Mr. Cimini have any such right under state law.

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Article 15 of the Massachusetts Declaration of Rights preserves "the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted" in 1780. At the time that the Constitution was adopted, all matters of marriage, divorce, alimony, and support of legitimate children were heard by the Governor and Council without a trial by jury. Department of Revenue v. Jarvenpaa, 404 Mass. 177, 187 (1989), citing Bucknam v. Bucknam, 176 Mass. 229, 230-231 (1900) .

15 id

16 Id., 12-13.

IV. Conclusion

The Superior Court properly entered summary judgment in favor of the state defendants and summary judgment should now be affirmed.

DEFENDANTS-APPELLEES MARILYN RAY SMITH, in her official and individual capacity, the MASSACHUSETTS DEPARTMENT OF REVENUE, and the COMMONWEALTH OF MASSACHUSETTS,

By their Attorneys, MARTHA COAKLEY, Attorney General,
/Signed/
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Relevant Fidelity's Pages Referenced by the Appeals Court

Subsequently, in later 2004 the DOR began sending Notices to Mr. Cimini advising him that he was in arrears on his child support. SA. at 12. Mr. Cimini repeatedly demanded of the DOR that he be afforded a jury trial as to the amount of his child support. SA. at 13. The DOR, acting through Smith, subsequently placed liens on several of Mr. Cimini's financial accounts and served a Notice of Levy on Mr. Cimini' s account at Fidelity in the amount of $6,245. SA. at 135. Fidelity complied with the levy.

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ARGUMENT X.
Introduction

In response to Mr. Cimini's filing of his complaint, Fidelity moved, pursuant to the Massachusetts Arbitration Act, G.L. c. 251 § 2 (the "Massachusetts Act") and the Federal Arbitration Act, 9 U.S.C. §§ 3 and 4 (the "FAA"), for an order compelling Mr. Cimini to pursue his claims in arbitration and to stay or dismiss the complaint. SA. at 84. Mr. Cimini' s opposition, SA. at 116, appears to assert that because the issues were too complex for an arbitration panel to decipher, the matter should remain in the Superior Court. He further maintained that Fidelity had waived the right to seek an order compelling arbitration because it had failed to file its own arbitration claim. Id. With respect to this issue, Mr. Cimini somehow believes that once he complained to Fidelity about its compliance with the child support levy, Fidelity was

obligated to initiate an arbitration proceeding, apparently on Mr. Cimini's behalf. Mr. Cimini cited no case law in support of this wrong-headed assertion.

Mr. Cimini's appellate brief asserts that Fidelity's failure to file its own claim for arbitration renders the arbitration clause void. Brief of Plaintiff/Appellant at p. 36. He cites to no cases, statues or other precedent in support of this proposition. For that reason alone, his claims against Fidelity amount to insufficient appellate argument under Mass.R.A.P. 16(a)(4) and should be dismissed. See e.g. McCone v. New England Tel. & Tel. Co. , 393 Mass. 231, 236 (1984) (cursory and conclusory argument without citation to authority is insufficient appellate argument).

To the extent the Court is inclined to consider Mr. Cimini's claims, however, the appeal still fails because under the substantive provisions of both the

AA and the Massachusetts Act, the trial court's dismissal of the case against Fidelity was appropriate, as Mr. Cimini can only pursue his claims, if at all, through arbitration due to the contractual arrangement between the parties.

II. THE TRIAL COURT APPROPRIATELY DISMISSED MR. CIMINI'S COMPLAINT AGAINST FIDELITY

Under both the FAA and the Massachusetts Arbitration Act, the trial court properly dismissed the case against Fidelity, as Mr. Cimini can only pursue his claims, if at all, in arbitration. Therefore, the trial court's order should be affirmed.

The FAA, 9 U.S.C. § 2, provides the following:

> "A written provision in . . .a contract evidencing a transaction involving interstate commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

The United States Supreme Court has declared this language to express a federal policy favoring arbitration. Mastrobuono v. Shearson Leman Hutton, Inc., 514 U.S. 52, 62 (1995).

The FAA was designed "to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate." Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219-220 (1985). In order to achieve its goal, the FAA therefore created a body of federal substantive law applicable in state and federal courts which enforce "the duty to honor an agreement to arbitrate." Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. 1, 25 n. 32 (1983). The courts have recognized a strong federal policy favoring arbitration, and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay or like defense to arbitrability." Id. at 24-25. Like any other state or federal court, Massachusetts courts enforce the FAA. See, e.g., Weston Securities Corp. v. Aykanian, 46 Mass. App. Ct. 72, 75 (1998). Because the agreement between Mr. Cimini and Fidelity is a "contract evidencing a transaction involving commerce," the FAA applies to this dispute. 9 U.S.C. § 2.

Similar to the FAA, the Massachusetts Arbitration Act "express[es] a strong public policy favoring arbitration." Home Gas Corp. of Mass., Inc. v. Walters' of Hadley, Inc., 403 Mass. 772, 774 (1989), quoting Danvers v. Wexler Constr. Co., 12 Mass. App. Ct. 160, 163 (1981). The Massachusetts Act also deems arbitration agreements enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." G.L. c. 251, § 1. By its plain terms, the Massachusetts Act applies as well.

Irrespective of whether the trial court below chose to apply the FAA or the Massachusetts Act, the claims asserted by Mr. Cimini in his complaint fall squarely within the parameters of the arbitration clause and therefore the Court correctly dismissed his Complaint upon Fidelity's Motion to Compel Arbitration and/or to Stay or Dismiss the Claim.

An order allowing a motion to compel arbitration, which arises under the Federal Arbitration Act, is subject to a de novo standard of review. Commonwealth v. Philip Morris Incorporated, 448 Mass. 836, 844 (2007); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002) (under FAA, order compelling abitration subject to a de novo review) . Such a review begins with the arbitration agreement, which in this case is broad in scope. Mr. Cimini agreed to submit "all controversies" with Fidelity to arbitration. SA. at 103. The dispute in this matter over the validity of the child support levy clearly is, by Mr. Cimini's own admission, a controversy. Thus, the Court needs to look no

further than the language of the arbitration agreement to conclude that an order to proceed to arbitration was entered appropriately by the trial court.

Repeatedly, the courts have stressed that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration" and the arbitration clause should be broadly construed. Moses H. Cone Mem. Hosp. v. Mercury Const. Corp., 460 U.S. at 24-25; Danvers v. Wexler Construction Co., Inc., 12 Mass. App. Ct. at 163 ("an agreement to arbitrate which is expressed in general terms 'should be construed as broadly as it was intended.'"). Indeed, arbitration should be compelled "unless it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Municipality of San Juan v. Corporacion Para El Fomento, 415 F.3d 145, 149 (1st Cir. 2005) . Here, Mr. Cimini asserts that Fidelity inappropriately complied with a child support levy that the Department of Revenue served upon it. Mr. Cimini attempts to articulate purported constitutional grounds for his argument that the child support levy was void and that Fidelity therefore breached its fiduciary duty to him by complying with it. To be sure, Mr. Cimini's constitutional arguments are without merit, but this Court need not address the merits in order to determine that the claims he asserts are subject to the arbitration agreement. Those claims, no matter how opaque, are in fact a "controversy" between the parties and must be

arbitrated[1].

The statute explicitly provides that a financial institution, such as Fidelity, shall not be held liable under any Federal or State law to any person for encumbering or surrendering any assets in response to a notice of lien or levy issued by a state agency. Id. Indeed, the Court's endorsement of Fidelity's motion, in which it ruled that the "Case was dismissed at to Fidelity", can be interpreted as a dismissal on the merits of Cimini's claims, as the argument that Fidelity was immune was presented to the trial court and opposed by Cimini. SA. at 130 and 136.

Finally, Mr. Cimini appears to suggest that Fidelity has somehow waived its right to compel him to arbitrate his claims. Mr. Cimini apparently believes that Fidelity had an obligation affirmatively to file an arbitration claim once he complained about Fidelity's compliance with the child support levy. This assertion is nonsensical. Fidelity is not seeking any redress from Mr. Cimini. It has asserted no claims to be resolved. Instead, it simply sought to have its contractual rights enforced by the Court, which both the FAA and the Massachusetts Act specifically allow. If Fidelity wanted to assert claims against Mr. Cimini, it would have to do so in arbitration. It is not now seeking, nor ever has it ever sought, to assert such claims. Mr. Cimini's

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[1] Fidelity also notes that pursuit of these claims in arbitration would be fruitless and frivolous, as Fidelity is absolutely immune from claims that it improperly complied with the child support levy pursuant to the provisions of 42 U.S.C. § 666 (a) 17 (C) (id.).

allegations are simply wrong, as they are contrary to common sense and without support in either the facts or the law. It is Mr. Cimini' s obligation to pursue

Therefore, this Court can affirm the judgment of dismissal on the grounds that Cimini's claim against Fidelity must fail as a matter of law. Colony of Wellfleet, Inc. v. Harris, 71 Mass. App. Ct. 522, 529 (2008)(Appeals Court will affirm a judgment as "long as the result is correct on any ground apparent on the record that supports the result reached by the trial court).his claims in arbitration; Fidelity has no responsibility to do so for him.

III. THE TRIAL COURT APPROPRIATELY DENIED MR. CIMINI'S MOTION FOR SANCTIONS

It is difficult to decipher from his appeal brief whether Mr. Cimini is appealing from the trial court's denial of his request for sanctions against Fidelity and Attorney Kerry Florio Labovitz. He contended to the trial court that sanctions should be issued because Attorney Labovitz had failed to redact his social security number, as well as the social security numbers of members of his family, when she attached his account application as an exhibit to her Memorandum in Support of the Motion to Compel Arbitration and to Stay or Dismiss. SA. at 122. The trial court denied Mr. Cimini's motion. SA. at 141.

If this Court interprets Mr. Cimini's appeal to include an appeal of this ruling, the Court should affirm the trial court's ruling. In his motion, Mr. Cimini cites no authority for his request for

sanctions. In general, a court's authority to issue sanctions is derived from its inherent power to do what is necessary to secure the administration of justice. New England Novelty Co. v. Sandberg, 314 Mass. 739, 746, cert denied 323 U.S. 740 (1944). Whether a trial court erred in issuing, or failing to issue, sanctions is reviewed for abuse of discretion. See Roxse Homes Ltd. Partnership v. Roxse Homes, Inc., 399 Mass. 401, 404-406 (1987).

Importantly, when Fidelity filed its Memorandum in Support of the Motion to Compel Arbitration and to Stay or Dismiss, there was no rule in place prohibiting the inclusion of personal identifying information in court filings. In fact, even today Massachusetts Courts have no rule or standing order prohibiting the inclusion of social security numbers in court filings2.

Denial of Mr. Cimini's request for sanctions was not an abuse of discretion. Mr. Cimini's request to have the information redacted was immediately allowed, he suffered no provable damages, and Attorney Labovitz broke no law nor violated any court standard in her filing. The trial court was

[2]In June 2008, the SJC solicited public comment on "Interim Guidelines for Protection of Personal Identifying Data in Publicly Accessible Court Documents" which suggests the redaction of social security numbers in pleadings. Even these guidelines, however, explicitly state that, "[t]he guidelines are interim in nature and ***carry no sanctions for violations.***" (Emphasis supplied)

therefore well within its discretion to deny Mr. Cimini's motion.

CONCLUSION

For the reasons stated herein, this Court should affirm the trial court's dismissal of Mr. Cimini's claims against Fidelity.

Respectfully submitted,

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/Signed/
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